

No. 22-CV-0200



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DISTRICT OF COLUMBIA COURT OF APPEALS

THEODORE ALBERT NELBACH,

Appellant,

v.

WILLOW NELBACH,

Appellee.

**On appeal from the Superior Court
of the District of Columbia, Civil Division**

BRIEF OF APPELLANT

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STATEMENT PURSUANT TO RULE 28(A)(2)(A)

The parties in this case are Theodore Albert Nelbach, the Appellant, and Willow Nelbach, the Appellee.

Theodore Albert Nelbach initially defended himself *pro se* before the Superior Court. He was later represented before the Superior Court in his Opposition to Plaintiff's Motion for Summary Judgement by Amy Norris, Esq. and Anna Nathanson, Esq. of Norris Law Group. Mr. Nelbach is represented before this Court by Anna Nathanson, Esq. of Norris Law Group.

Willow Nelbach was represented in the Superior Court and is represented in this Court by David Bateman, Esq. and Daniel Rathbun, Esq. of Rathbun Bateman, P.C.

There are currently no intervenors of *amici curiae* in this matter.

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JURISDICTIONAL STATEMENT

This appeal is from a final order that disposes of all parties' claims. This Court accordingly has jurisdiction over this appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether \$1600 of tax arrears, during a pandemic when there is no foreclosure threatened, is enough to constitute waste under D.C. Code § § 42-1601 and -1603.

Whether the severe remedies of forfeiture and treble damages are preceded where there is not voluntary waste under D.C. Code § § 42-1601 and -1603.

STATEMENT OF THE CASE

Mr. Theodore Albert Nelbach owns real property located at 4517 Clay Street, NE, Washington, DC 20019 ("Property"). The property is used for public housing and he maintains the property up to HUD code, with yearly inspections. Mr. Nelbach is the life tenant for the property. Plaintiff, Willow Nelbach, the remainderman, claims that the property's past tax arrears are waste under D.C. Code § § 42-1601 and -1603 and grounds for forfeiture of the life tenant's interest in the property and for treble damages for the amount of the tax arrears. From January 1, 2017 through August 17, 2021, the life tenant paid \$2,689.19 in taxes,

however he fell behind in paying the taxes by several thousands of dollars. Appendix P. 45, 50-53. As of December 3, 2021, the taxes are current. There has never been a tax taking recorded and for the past two years, the foreclosure moratorium has barred a tax foreclosure sale due to the unique financial challenges homeowners face during an unprecedented global pandemic.

Ms. Nelbach (“remainderman”) brought this action on June 18, 2021. On August 9, 2021, the remainderman moved for summary judgment. On November 1, 2021, Mr. Nelbach (“life tenant”) filed an opposition to the motion for summary judgment on the grounds that an irregular tax payment history does not constitute waste for the purposes of D.C. Code § § 42-1601 and -1603, and that there are material facts in dispute about the tax payment history. Remainderman filed a reply on November 3, 2021. On December 3, 2021, the life tenant paid off the remaining tax arrears of approximately \$1630.

On February 23, 2022, the Superior Court of the District of Columbia granted the remainderman’s motion for summary judgment and ordered the termination of the life tenant’s interest in the property and the payment of treble damages in the amount of \$24,449.52 (plus costs, interest, and fees)— specifically, on the grounds that approximately \$1630 in tax arrears is grounds for forfeiture of the life tenant’s interest and for treble damages under D.C. Code § § 42-1601 and -1603. In actuality, the life tenant paid the approximately \$1630 in tax arrears

before the February 23, 2022 Order. The life tenant filed a timely notice of appeal to this Court on March 24, 2022.

STATEMENT OF THE FACTS

The life tenant upkeeps the Property in good condition. The Property conditions are inspected yearly by HUD, and under the life tenant's care, the Property has passed all of its HUD inspections. The life tenant made tax payments of \$910.55 in the First Half of 2017, \$121.02, \$9.17, and \$910.55 on June 4, 2019, \$100 on January 24, 2021, and \$637.90 on August 17, 2021. Appendix P. 45, 50-53. The life tenant also made a tax payment of approximately \$1630 on December 3, 2021. The remainderman made tax payments of \$5600 on May 29, 2021 and of \$879.94 on August 13, 2021. Appendix P. 21, 67. At their peak in May 2021, the tax arrears were \$6955.78. Appendix P. 29. As of December 3, 2021, the taxes are current.

From March 11, 2020 to present, tax foreclosures have been barred by the foreclosure moratorium. D.C. Code § 42–851.01. On April 29, 2021, the Office of Tax and Revenue sent a letter to the remainderman stating that “Notice is given that unless you pay the amount stated above or fall within one of the limited exemptions from the tax sale, the Office of Tax and Revenue may sell this real property at tax sale.” Appendix P. 27. The property is an occupied property. It is

occupied by tenants who receive HUD vouchers. Appendix P. 46. As an occupied property, the property fell under one of the exemptions from the tax sale, as the foreclosure moratorium applies. On August 25, 2021, the Office of Tax and Revenue sent the life tenant a letter confirming that the property was not at risk of tax sale because it fell under the occupied property exemption. Appendix P. 56.

SUMMARY OF THE ARGUMENT

This is a case of first impression. D.C. Courts have never previously ordered forfeiture of a life tenant's interest and treble damages over a life tenant's failure to pay taxes. D.C. Courts have never previously ruled that tax arrears constitute waste. There is no precedent in the District of Columbia for the application of the severe remedies of D.C. Code § § 42-1601 and -1603 to a life tenant's small tax deficiency, especially during a pandemic where a foreclosure moratorium meant that there was no risk of a tax taking being recorded.

When one looks to how other jurisdictions with analogous waste statutes have handled this issue, they only apply these severe remedies for instances of voluntary waste, and they do not order forfeiture over a failure to pay taxes. If a small tax deficiency with no tax taking recorded is waste at all, it is permissive waste. D.C. Code § § 42-1601 and -1603 do not apply to permissive waste or to small tax arrears.

In the one case where a D.C. Court has ordered a remedy for a life tenant's failure to pay taxes, the Court ordered the life tenant to pay off the tax arrears within thirty days, and only ordered a sale of the life tenant's interest if he failed to meet this order. *Elliot v. Lamon*, 1 MacArth. 647 (D.C. 1874). This approach equitably balances the interests of the life tenant and the remainderman. Here, this approach is appropriate because, in fact, the life tenant Mr. Nelbach paid off the approximately \$1630 in tax arrears on the property on December 3, 2021.

ARGUMENT

I. Standard of Review

This Court reviews the grant or denial of a motion for summary judgment *de novo*. *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 437 (D.C. 2013); *Choharis v. State Farm Fire and Cas. Co.*, 961 A.2d 1080, 1088 (D.C. 2008); *Malone v. Saxony Co-op Apartments, Inc.*, 763 A.2d 725, 728 (D.C. 2000).

II. Tax Arrears, Especially in the Absence of the Possibility of a Tax Foreclosure, Do Not Constitute Waste under D.C. Code § § 42-1601 and -1603

D.C. Courts have never previously ruled that failure to pay taxes constitutes waste of any kind. Waste is considered to be any intentional or negligent act or omission on the part of a tenant which causes permanent injury to the inheritance or underlying property interest. 93 C.J.S. Waste § 1. Here, the tax arrears have not caused permanent injury to the underlying property interest because no tax taking

has been recorded. In fact, the D.C. foreclosure moratorium bars a tax foreclosure against the property, so presently there is not even a threat of permanent injury to the underlying property interest. D.C. Code § 42–851.01. Tax arrears themselves are not a permanent injury; here, as of December 3, 2021 the taxes have been paid off in full. Tax arrears are certainly not a permanent injury during a time period where a permanent tax taking is barred.

There are three cases in which D.C. Courts mention the life tenant's responsibility to pay tax arrears, but none of those cases considered whether failure to pay taxes constitutes waste. In the first, the Court found that the life tenant was responsible for paying tax arrears, but did not order forfeiture or treble damages as a remedy. *Elliot v. Lamon*. The Court ordered the life tenant to pay off the tax arrears within thirty days, and only ordered a sale of the life tenant's interest if he failed to meet this order. *Ibid*. In the second, the Court makes a passing reference to the plaintiff's allegation that the life tenant failed to pay taxes accruing on the property, but made a ruling on an unrelated issue. *Atkins v. Best*, 27 App. D.C. 148 (1906). In the third, the Court found that the life tenant is responsible for tax payments, but the case did not concern remedies against the life tenant. *Stansbury v. Inglehart*, 20 D.C. 134 (D.C. 1889).

Thus, D.C. Courts have never ordered forfeiture of a life tenant's interest or treble damages as a result of a life tenant's failure to pay taxes. *Elliot v. Lamon* is the only case for which a D.C. Court has ordered a remedy against a life tenant for

failure to pay taxes. In 1874, a failure to pay taxes was a serious threat to the property interests because there was a risk of a tax sale. The present action concerns a time period during which there was a foreclosure moratorium due to an unprecedented global pandemic, during which there has never been a risk of a tax sale. Here, unlike in *Elliot v. Lamon*, the tax arrears could not impact title. Court intervention is not necessary here to protect the remainderman's interest. Thus, *Elliot v. Lamon* does not justify an order of forfeiture and treble damages for the present matter.

III. Tax Arrears are Not Voluntary Waste, and D.C. Code § § 42-1601 and -1603 Only Apply to Voluntary Waste, so Forfeiture and Treble Damages Are Not Proper Remedies

D.C. Code § § 42-1601 and -1603 are adapted from the English Statute of Gloucester. The Statute of Gloucester provided that, “he which shall be attainted of waste shall lose the thing wasted, and moreover shall recompense thrice as much as the waste shall be taxed at.” *Black’s Law Dictionary* 1584 (2d. ed. 1899)(internal citation to Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 13 (2d. ed. 1899)). D.C. Code § 42-1601 provides, virtually identically, that “he which shall be attainted of waste, shall lease the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at.” D.C. Code § 42-1601. Due their severe remedies, statutes enacted following the

Statute of Gloucester should be strictly construed to apply only to voluntary waste, unless it is expressly provided that they apply to permissive waste:

Apparently following the English Statute of Gloucester in this respect, a number of states have enacted statutes to the effect that a tenant for life or for years shall be required to pay treble damages. In five jurisdictions are found statutes allowing double damages. This remedy being of such a severe character, the statutes would doubtless be strictly construed. While the statutes do not all make the point clear, it would seem that, unless otherwise expressly provided, multiple damages would be permitted only for voluntary waste and not for permissive waste.

4 Simes & Smith, the Law of Future Interests (3d ed.) § 1658. For example, California's adaptation of the English Statute of Gloucester, West's Ann. Code of Civil Procedure, § 732, only applies to voluntary waste because it applies to life tenants who "commit waste." Ibid. Similarly, a number of jurisdictions allow forfeiture only if the waste is voluntary. 4 Simes & Smith, the Law of Future Interests (3d ed.) § 1659.

D.C. Code § 42-1601 has the classic Statute of Gloucester language with no explicit reference to permissive waste added; it should be interpreted to apply only to voluntary waste. D.C. Code § 42-1603 discusses "the waste committed by" the life tenant, which is also a description of voluntary waste. D.C. Code § 42-1603. This D.C. statutory scheme applies to the commission of waste, i.e. voluntary waste. D.C. Code § § 42-1601 and -1603 only apply where life tenant's commit voluntary waste.

In the District of Columbia, failure to pay taxes is not voluntary waste. Voluntary waste involves the commission of deliberate, willful, or voluntary destruction of the property. 93 C.J.S. Waste § 7. Permissive waste involves acts of omission rather than commission. 93 C.J.S. Waste § 8. A failure to pay taxes is an act of omission, thus if found to rise to the level of waste, it is permissive waste. Minnesota also has a waste statute adapted from the Statute of Gloucester, and Minnesota does not consider tax arrears to be voluntary waste. *Beliveau v. Beliveau*, 217 Minn. 235, 243 (1944).

Thus, D.C. Code § § 42-1601 and -1603 do not apply to a life tenant's failure to pay taxes, because that is not voluntary waste, and these statutes only apply to voluntary waste. The severe remedies of forfeiture and treble damages are not authorized in the absence of voluntary waste. There is no voluntary waste here; the Property is in good condition, as demonstrated by the Property's passage of yearly HUD inspections. Severe remedies are inappropriate here.

Across all United States jurisdictions, there is scant or non-existent precedent of forfeiture as a remedy for a life tenant's failure to pay taxes where there has not been a tax taking recorded. Some jurisdictions have found that forfeiture cannot result from a life tenant's failure to pay taxes. *Magness v. Harris*, 80 Ark. 583 (1906); *Johnson v. Pettit*, 1 Cin. Sup. Ct. Rep. 25 (Ohio 1870);

Estabrook v. Royon, 52 Ohio St. 318 (1895); *See Anderson v. Messenger*, 158 F. 250 (6th Cir. 1907); *See Smith v. Miller*, 158 N.C. 98 (1911).

Many jurisdictions use receivership, and not forfeiture, as the remedy for a life tenant's failure to pay taxes. *Downey v. Strouse*, 101 Va. 226 (1903); *Goodman v. Malcolm*, 5 Kan. App. 285 (1897); *King v. King*, 9 Jones & S. 516 (N.Y. 1877); *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124 (1896); *Cannon v. Barry*, 59 Miss. 289 (1881); *Murch v. J. O. Smith Mfg. Co.*, 47 N.J. Eq. 193 (1890); *Woolston v. Pullen*, 88 N.J. Eq. 35 (1917); *Cairns v. Chabert*, 3 Edw. Ch. 312 (N.Y. 1839); *See Sidenberg v. Ely*, 90 N.Y. 257 (1882); *Sage v. Gloversville*, 43 App. Div. 245 (App. Div. 1899); *Abernethy v. Orton*, 42 Or. 437 (1903); *Bidwell v. Greenshield*, 2 Abb. N.C. 427 (N.Y. 1876).

Many jurisdictions, when considering cases where the remainderman paid taxes on the estate that the life tenant had let accrue, did not use the remedy of forfeiture, but instead limited their inquiry to whether or not the remainderman could recover the sum paid on taxes from the life tenant. Some jurisdictions use the remedy of allowing the remainderman to recover the tax sum paid from the life tenant. *Ure v. Ure*, 223 Ill. 454 (1906); *Jenks v. Horton*, 96 Mich. 13 (1893); *Bidwell v. Greenshield*; *Abernethy v. Orton*.

However, in certain circumstances, the remedy of recovering tax sums paid by the remainderman has been denied. *Huddleston v. Washington*, 136 Cal. 514

(1902); *Ferguson v. Quinn*, 97 Tenn. 46 (1896). In *Huddleston v. Washington*, the Court found that the remainderman was not under compulsion or duress to pay the taxes, so was not entitled to repayment from the life tenant. Although the taxes were about to go into default, which could have triggered tax penalties, the Court found this did not constitute “actual and existing duress” to the personal property which would entitle the remainderman to recover the sum paid from the life tenant. *Huddleston v. Washington*. Similarly, in the present matter, the remainderman made tax payments in the absence of actual and existing duress to the property. On April 29, 2021, the remainderman received an intimidating letter from the Office of Tax and Remainderman that nonetheless stated that, “Notice is given that unless you pay the amount stated above **or fall within one of the limited exemptions from the tax sale**, the Office of Tax and Revenue may sell this real property at tax sale.” (Emphasis added), Appendix P. 27. Due to the foreclosure moratorium, the owner-occupied property fell under one of the exemptions, and was never at risk of tax sale. It is not the life tenant’s fault if the remainderman did not investigate that the property was exempted from tax sale. The remainderman elected to make tax payments, and did not make them under actual and existing duress. Here, the remainderman should not be found to be entitled to repayment because she voluntarily made tax payments.

D.C. courts have never before applied the severe remedies of forfeiture and treble damages to a matter where the life tenant has tax arrears. Across other

jurisdictions, courts have almost always used different remedies, like receivership, when there is a need to balance the interests of the life tenant and the remainderman due to tax arrears. Courts have never or virtually never ordered forfeiture in the absence of the recording of a tax taking. Here, forfeiture and treble damages would be unprecedented remedies.

CONCLUSION

Appellant respectfully requests that this Court deny the motion for summary judgement and remand to the trial court to proceed with the case on the merits.

Submitted: August 22, 2022

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was served to all parties by the Court's electronic filing system if registered on this 22nd day of August, 2022, to the following persons:

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District of Columbia Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual’s social-security number
- Taxpayer-identification number
- Driver’s license or non-driver’s’ license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

- (1) the acronym “SS#” where the individual’s social-security number would have been included;
- (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
- (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
- (4) the year of the individual’s birth;
- (5) the minor’s initials; and
- (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.

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No. 22-CV-0200
Case Number(s)

8/22/22
Date